No. 84-749

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ALEXANDER L. STEVAS,
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# In the Supreme Court of the United States

OCTOBER TERM, 1984

CLARENCE MOORE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

REX E. LEE
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Petitioner contends that the United States should be barred from collecting a civil penalty assessed against him for violation of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*

1. Section 518 of the Surface Mining Act, 30 U.S.C. 1268, prescribes the manner for assessing civil penalties for violations of the Act. Section 518(a), 30 U.S.C. 1268(a), provides that the Secretary may assess civil penalties for violations of the Act (and shall assess such penalties where a cessation order has been issued), not to exceed $5,000 for each violation. Such penalties may be assessed "only after the person charged with a violation * * * has been given an opportunity for a public hearing" which "shall be of record and shall be subject to [the Administrative Procedure Act]". Section 518(b), 30 U.S.C. 1268(b). The critical provision for purposes of this case is Section 518(c), 30 U.S.C. 1268(c),

which provides that, after the Secretary informs the operator of the proposed amount of the penalty for a violation, "[t]he person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account." Should the operator prevail in whole or in part in the administrative proceedings or on judicial review, the deposited funds or the appropriate part of them must be returned with interest. *Ibid.* "Failure to forward the money to the Secretary within thirty days," however, "shall result in a waiver of all legal rights to contest the violation or the amount of the penalty." *Ibid.*

Petitioner failed to avail himself of these statutory procedures. Accordingly, the district court found — and the court of appeals agreed — that he waived any right to contest these penalties. The judgments of the courts below are correct and do not conflict with any decision of this Court or any other court of appeals. Therefore, further review by this Court is not warranted.

2. Petitioner's claim that the prepayment requirement of 30 U.S.C. 1268(c) is unconstitutional has been rejected by every court of appeals that has considered it. *Graham* v. *Office of Surface Mining Reclamation & Enforcement*, 722 F.2d 1106 (3d Cir. 1983); *Blackhawk Mining Co.* v. *Andrus*, 711 F.2d 753 (6th Cir. 1983); *B & M Coal Corp.* v. *Office of Surface Mining Reclamation & Enforcement*, 699 F.2d 381 (7th Cir. 1983). In fact, petitioner himself has unsuccessfully advanced this argument twice before, and this Court has refused to consider it. *United States* v. *Julian H. Crews and Clarence Moore d/b/a D.C. Coal Co.*, 705 F.2d 459 (6th Cir. 1982) (Table), cert. denied, 460 U.S. 1083 (1983); *United States* v. *Clarence Moore d/b/a Log Mountain Mining Co.*, 550 F. Supp. 811 (E.D. Tenn. 1982),

aff'd, 734 F.2d 17 (6th Cir. 1984) (Table), cert. denied, No. 84-41 (Oct. 9, 1984). There is no more reason for this Court to consider it now than there was on the prior occasions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

DECEMBER 1984

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